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THE INDIVIDUAL EMPLOYMENT CONTRACT UNDER THE WAGNER ACT: I

HEINRICH HOENIGER†

I. *Individual Employment Contract and Individual Bargain*

IN the March issue of the *Harvard Law Review* Professor Chester Ward in his article "The Mechanics of Collective Bargaining" states:

"The impact of the command to bargain collectively upon the privilege of the employers to make individual contracts of employment with their employees is presently incalculable. Certain it is, however, that this is one of the gravest problems arising under the Act. . . ."¹

This intricate problem can scarcely be brought to a closer solution without venturing a wider and more comprehensive attack. This article ventures such an attack and, therefore, tries to outline ideas which may serve to disentangle this rather complex confusion. Such a tentative analysis requires, at its outset, clarification of the term: "individual contract of employment", for this term has up to now not always been used in only one sense. At least two connotations of this term can clearly be distinguished. Either of them entails quite different problems. On the one hand, the term denotes nothing else than the initial and simple contract of hiring without any reference to employment conditions. On the other hand, the term "individual employment contract" in addition to the contract of hiring refers to the "individual bargain" over employment conditions and is used in antithesis to "collective bargaining".² For reasons of expediency these two connotations shall be discussed in reversed order, *i.e.*, the first one under B, and the second under A.

A. In the abovementioned article Professor Ward uses the term "individual contract of employment" in the second sense, *i.e.*, as an equivalent to "individual bargain", when he discusses the NLRB's decisions in *Hanson-Whitney Machine Co.*,³ and *Schierbrock Motors*.⁴ In both cases the employer entered into a bargain with individual employees instead of bargaining with the union. In these decisions the NLRB

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It is my privilege to express my gratitude to the Carl Schurz Memorial Foundation which enabled me to secure the assistance of Dr. Paul Fischer. I wish to acknowledge his valuable collaboration in completing this comprehensive survey.

1. 53 HARV. L. REV. (1940) 754, 787.

2. COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (4th ed. 1936) 372.

3. 8 N.L.R.B. 153 (1938).

4. 15 N.L.R.B. 1109 (1939).

ordered the employers to bargain collectively, and such orders have left scarcely any opportunity for individual bargaining. The same restrictive opinion is expressed by Commons and Andrews:

"Where a collective bargain is made, each individual worker is employed on the terms contained in the bargain. He virtually makes no individual bargain at all. . . ."⁵

and by Taylor:

"Obviously . . . there can be but little individual bargaining."⁶

If there are opportunities left for the making of an individual bargain, they must be exceptions to the general rule.

Hence the first problem arises: Under the system of collective bargaining governed by the Wagner Act, what remains of the individual bargain? In what exceptional cases does individual bargaining still exist?

This was the question that Professor Ward made the subject of his investigation. Not satisfied with the Board's view he contrasted it with the Supreme Court's *dictum* in *NLRB v. Jones & Laughlin Steel Corp.*:

"The Act does not compel agreement between employers and employees. It does not compel any agreement whatever."⁷

But, if the Act does not compel collective agreements, it at least expects such agreements as the usual outcome of real negotiations in good faith. To obtain this result the statute "does command those preliminary steps without which no agreements can be reached."⁸ A close analysis of the Court's decision leaves no doubt that there exists no alternative for the employer, either to bargain collectively or to conclude individual bargains. Therefore, the conclusion which was reached by the NLRB in

5. COMMONS AND ANDREWS, *op. cit. supra* note 2 at 372.

"When the discussion is between the employer or his representative and a single wage-earner, and is concerned exclusively with that individual wage-earner's contract, the process is said to be individual bargaining." Fitch, *The Causes of Industrial Unrest* (1924) 149 HARPER'S 101, 103.

6. TAYLOR, *LABOR PROBLEMS AND LABOR LAW* (1938) 182.

7. 301 U. S. 1, 45 (1937).

8. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515 (1937). Restated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44 (1937): "We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other", and applied to NLRA § 9 (a), 29 U. S. C. A. § 159 (a).

"It is true that the act does not require the parties to agree but merely to negotiate with each other; but it is based upon the idea that negotiations honestly entered into will generally result in the settlement of differences, and commands negotiations for that reason. Statistics show the reasonableness of the hope upon which it proceeds." *Jeffrey-De Witt Insulator Co. v. NLRB*, 91 F. (2d) 134, 139 (C. C. A. 4th, 1937).

Stolle Corp.,⁹ and *Schierbrock Motors*, and which was questioned by Professor Ward is correct. In these cases it was held that the right to make individual contracts has not been held by the Supreme Court to be permissible alternative to the obligation of collective bargaining when the employees have, in accordance with the Act, selected representatives therefor. The duty to bargain collectively stands as the general rule. Only if the requirements of collective bargaining are not present, the NLRB does not exclude individual bargaining. Professor Ward has mentioned such an exceptional case to be "when a majority had not designated a collective agent." In his opinion it is, however, arguable whether the Supreme Court refers only to such exceptional instances when stating in the *Jones & Laughlin* case:

"It (the Act) does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'".¹⁰

The Supreme Court has, however, clarified its opinion in more recent decisions, particularly in *National Licorice Co. v. NLRB*.¹¹ It cannot be doubted any longer that the Supreme Court has actually excluded any alternative of bargaining individually when the requirements of collective bargaining are present. In other words, individual bargains which do not violate the NLRA can be had only in exceptional instances. Our first problem, to be discussed in Section II of this article, is therefore first to canvass these exceptional cases, and secondly to analyse the implications of individual bargains made in violation of the NLRA.

B. The second problem concerning the employer's privilege to make individual contracts with his employees refers to the simple and initial contract of hiring and its dissolution through discharge. The Supreme Court considered this entirely different question in the same paragraph of the *Jones & Laughlin* decision and in close connection with the aforementioned sentences of the opinion. There it was said:

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."¹²

Evidently the right to select and to discharge individual employees, recognized by the decision, must have a contractual source. Since the *Jones & Laughlin* case stated that the Wagner Act, which aims to facil-

9. 13 N.L.R.B. 370 (1939). See *NLRB v. Lightner Publishing Corp. of Illinois*, 113 F. (2d) 621 (C. C. A. 7th, 1940); *Jahn & Ollier Engraving Co.*, 24 N.L.R.B. No. 94 (1940).

10. 301 U. S. 1, 45 (1937).

11. 309 U. S. 350 (1940); Section II, 2 *infra*.

12. 301 U. S. 1, 45 (1937).

itate collective agreements, "does not interfere" with this right, this source must exist separately from any collective agreement. Further, since the right is said to exist at the same time when the general employer-employee relations are governed by the full sweep of the collective bargaining agreement, this latter agreement must be different from the individual bargain.¹³ But the right of the employer to select and to discharge applies to the individual employee. Therefore its source must be a contract which exists solely between the individual employee and the employer, to wit: the individual employment contract. While the collective agreement is generally laid down in a written contract, the individual employment contract is often a parol contract.¹⁴

This duality, *i.e.* the fact that such an individual employment contract exists independently from the collective agreement, is recognized not only by the Supreme Court but also by a host of observers.¹⁵ The terms of the collective agreement apply only to persons integrated into the employer's business organization,¹⁶ *i.e.* to persons hired by means of an individual employment contract. The contract of hiring establishes the employer-employee relation or the employee status. When, in the regular case, almost all the employment conditions are determined by the collective agreement, what is the significance of the individual contract of

13. However, the individual employment contract might coincide with the individual bargain in the exceptional cases where the latter is still permissible. Section II, *infra*. Prof. Ward uses the terms individual bargain and individual contract of employment interchangeably. In this article, "collective bargaining," the procedure, and "collective agreement," its result, form one pair of terms; "individual bargaining", and "individual bargain," the other pair.

14. "When the collective agreement, tacitly or expressly, is taken as supplying any or all of the terms of the service of a particular employee, it still is not the contract, but only a standard, to which the parties have referred in making their parol contract." *Illinois Central Railroad v. Moore*, 2 Labor Cases 845 (C. C. A. 5th, 1940).

15. Hamilton, *Individual Rights Arising from Collective Labor Contracts* (1938) 3 Mo. L. REV. 252; Fuchs, *Collective Labor Agreements in American Law* (1924) 10 St. Louis L. REV. 1; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229; *Theories of Enforcement of Collective Labor Agreements* (1932) 41 YALE L. REV. 1221. A very significant statement on this subject was made by Hamilton, *Collective Bargaining* (1935) 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 628, 629: "The process of collective bargaining results, not in a labor contract, but in a trade agreement. This imposes no obligation upon the employer to offer or upon the laborers to accept work; . . . It is nothing more than a statement of the conditions upon which such work as is offered and accepted is to be done. *The contract of employment is still between the individual employer and the individual employee, . . .*" (Italics supplied.)

16. This principle was outlined by the writer of this article in Hoeniger, *Labor Law—An Instrument for Social Peace and Progress* (1940) FORDHAM UNIV. SOCIAL STUDIES 13.

hiring? From the foregoing this conclusion can be drawn: It refers to the employer's right to select his employees. And by implication the second correlative right to discharge can be added. This was the solution seemingly suggested by the Supreme Court in the *Jones & Laughlin* case and confirmed by the Court in many instances.¹⁷

The right to select and to discharge, to hire and to fire,¹⁸ are creations of the individual employment contract, of the contract of hiring. But are these rights not subject to restrictions imposed either by collective agreements, *i.e.* agreements entered into voluntarily or by law, particularly by the provisions of the Wagner Act? This is the second main problem this article ventures to disentangle.

Briefly to restate the above problem: Collective bargaining under the NLRA exerts a strong influence upon individual bargaining as well as upon the rights to select and to discharge created by the contract of hiring. To measure the extent of this influence, it is necessary to inquire:

1. To what extent is there still a possibility for individual bargaining under the Wagner Act? And what are the legal implications of individual bargains which violate the NLRA?

2. To what extent does the prevailing system of collective bargaining under the Wagner Act restrict the right to select and to discharge?

To answer the second question it will be necessary to analyze the effect of the individual employment contract which creates, or by its dissolution terminates, the employee status. Then it may be possible to correlate these types of the status to various restrictions on the right to create or destroy it. In this way we may succeed, at least tentatively, in building up a systematic structure of the employee status.¹⁹

II. *The Individual Bargain*

In the foregoing section the distinction was made between collective bargaining and individual bargaining. If rates of pay, wages, hours of employment and conditions of employment were agreed upon by the employer or an association of employers and the representative of a unit of employees, a collective bargain would exist. On the other hand if no collective bargain were made and if the individual employee and

17. *NLRB v. Jones & Laughlin*, 301 U. S. 1 (1937); *Associated Press v. NLRB*, 301 U. S. 103 (1937). For the right to discharge, see *NLRB v. Fansteel Metallurgical Corporation*, 306 U. S. 240 (1939).

18. Among the rights which remain with the management under a collective agreement are (1) selecting new employees, (2) determining who shall be dropped. Bergen, *Management Prerogatives* (1940) 53 HARV. BUS. REV. 277.

19. See Sections III-V *infra*.

the employer were haggling over the terms of employment, an individual bargain might result from the negotiations.

But fixing of employment conditions itself under either of these methods does not create the employer-employee relation. The collective agreement

"... establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the *terms* on which contracts of employment may be satisfactorily made and carried out."²⁰

Therefore, to bring about this "concrete contract between employer and any employee", to create the employee status, the individual employee must be hired by an individual employment contract. Since individual bargaining results but in the fixing of employment conditions individually, the same initial element of an individual employment contract must be added: the man must be hired.

Even in the case of an individual bargain, the actual employment relation is based upon two contractual elements, the contract of hiring and the individual bargain over employment conditions. Both these contracts are concluded between the very same parties. Hence it is possible, and often occurs, that these two transactions coincide. Then they appear to be but one transaction, that of hiring and fixing the employment conditions at the same time. But this is not necessarily so. The employee may have been hired years ago. His employment conditions may have been fixed by a collective agreement, which has just expired. A new collective agreement has not yet been reached, despite negotiations in good faith.²¹ For the time being the employment conditions of the employee may be fixed through an individual bargain. In such a case the individual bargain is clearly distinct from the contract of hiring which created his employee status years ago.

The collective agreement provides standards for the employment conditions. Its effect is, therefore, that all employees of the unit in question are employed under the very same terms. An equiponderant effect may be obtained through the conclusion of several individual bargains which follow a pattern and show identical conditions of employment. Such model or pattern-contracts are usually provided by the employer,²² or

20. *Yazoo & M. V. R. Co. v. Webb*, 64 F. (2d) 902, 903 (C. C. A. 5th, 1933). (Italics inserted.)

21. Notes 34 and 35 *infra*.

22. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917); *Phillips Petroleum Company*, 23 N.L.R.B. No. 74 (1940).

by the employers' associations.²³ Such a plurality of individual pattern-contracts is clearly distinct from a collective agreement which is to be concluded between the employer and the union representing the bargaining unit of the employees.

Prior to the enactment of the Wagner Act individual bargaining held a dominant position in the establishment of employment relations. According to the United States Department of Labor,²⁴ 76.5% out of 14,825 establishments investigated, employing 1,935,673 workers, used this device to deal with their employees. The picture changed completely since the NLRA was enacted, especially since its constitutionality was upheld by the Supreme Court.²⁵ But individual bargaining is still important in the following strata not reached by the NLRA.

A. The NLRA only applies to employments affecting interstate commerce. Therefore a gap had to be left open in the realm of intrastate commerce. This gap was in a few cases closed by state statutes, the so-called "little Wagner Acts."²⁶

B. Further, the Act does not apply to
 "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."²⁷

Neither does it apply to

"employees of the United States or any State or political subdivision thereof."²⁸

Our investigation, however, is not concerned with the cases not within, or exempt from, the Wagner Act or similar state statutes. The question under consideration is whether within the scope of the statutes ordering

23. *Atlas Bag & Burlap Co.*, 1 N.L.R.B. 292 (1936); *National Licorice Co.*, 7 N.L.R.B. 537, 309 U. S. 350 (1940); *American Mfg. Co. v. NLRB*, 309 U. S. 629 (1940).

24. WATKINS AND DODD, *MANAGEMENT OF LABOR RELATIONS* p. 681; (1935) 38 MONTHLY LABOR REV., statistics.

25. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Associated Press v. NLRB*, 301 U. S. 103 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937); *Washington, Virginia and Maryland Coach Co. v. NLRB*, 301 U. S. 142 (1937).

26. JAEGER, *CASES AND STATUTES ON LABOR LAW* (1939) 1068, lists: Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah, Virginia and Wisconsin. In addition the concept of "affecting interstate commerce" has been constantly stretched by the Supreme Court. See ROSENFARB, *THE NATIONAL LABOR POLICY* 409.

27. NLRA § 2 (3), 29 U. S. C. A. § 152 (3).

28. NLRA § 2 (2), 29 U. S. C. A. § 152 (2). To list the exemption of railway employment contracts from the NLRA could be dispensed with, since those contracts are subject to the Railway Labor Act § 2 (1), 45 U. S. C. A. § 152 (1), which establishes a duty to bargain collectively similar to that in NLRA § 8 (5), 29 U. S. C. A. § 158 (5).

the employers to bargain collectively there is still an opportunity for individual bargaining.

The Wagner Act states explicitly that protection by law of the right of employees to bargain collectively

"safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest."²⁹

The "refusal to bargain collectively with the representatives of his employees"³⁰ constitutes an unfair labor practice by the employer. Or, to state it in the positive form: Upon him rests the duty to bargain collectively in good faith.³¹ If he complies with this duty, the expected result will be a collective agreement. In the case which the Wagner Act³² attempts to make the normal one, the relationship will be the product of two factors: (a) the collective agreement, and (b) the individual employment contract. These two factors thus create the regular and perfect employee status. Perfect, because the parties have met the requirements of the Wagner Act completely. The desired procedure, collective bargaining, was elected by the parties. It was successful. Nothing remains to be done.

Two other cases are to be discussed. In both of them the regular employee status is established through individual contracts of hiring. The status is however not perfect because, contrary to the goal of the Wagner Act, the employment conditions are not determined through collective bargaining, but through individual bargains. Only in exceptional cases such individual bargains, although not in conformity with the tendency of the Wagner Act, may not violate its provisions and, therefore, be tolerated. These exceptions are dealt with under subsection 2. Generally, individual bargains are not only contrary to the policy of the NLRA but violate its provisions. The implications of these later cases are discussed under subsection 2.

1. There are two main instances³³ of exceptional cases where indi-

29. NLRA § 1, 29 U. S. C. A. § 151; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936); *NLRB v. Columbian Enameling and Stamping Co.*, 306 U. S. 292 (1938); *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1938); *Virginian Ry. Co. v. System Federation*, 300 U. S. 575 (1936); *NLRB v. Remington Rand Inc.*, 94 F. (2d) 862 (C. C. A. 2d, 1938).

30. NLRA § 8 (5), 29 U. S. C. A. § 8 (5).

31. *S. L. Allen & Co.*, 1 N.L.R.B. 714, 717 (1936).

32. "The Act contemplates the making of contracts with labor organizations. This is the manifest objective in providing for collective bargaining." *Consolidated Edison v. NLRB*, 305 U. S. 197, 236 (1938).

33. Garrison, *Government & Labor: The Latest Phase* (1937) 37 *COL. L. REV.* 897.

vidual bargains do not violate the provisions of the Wagner Act. Both of them have found recognition in litigation. The first exception takes place when the duty to bargain collectively has ceased to exist or is suspended, the second when not all premises of this duty exist.

a. The employer is not required to continue to bargain collectively with the representatives of his employees when negotiations already have indicated that their continuation would be futile. In *In re Jeffrey-DeWitt*³⁴ the Board dealt with the case where an impasse in negotiations had been reached between the employer and its employees. There the principle was established that in such a case the employer may be justified in refusing to meet further with the employees for the reason that no new agreement is possible. The duty of the employer to bargain has been suspended for the duration of the deadlock.³⁵ This temporary phenomenon contravenes so seriously the tendency of the NLRA that the Board has demonstrated itself to be very reluctant to recognize the suspension of the duty to bargain collectively.

"Every avenue and possibility of negotiation must be exhausted, before it should be admitted that an irreconcilable difference creating an impasse has been reached."³⁶

As soon as a new avenue to successful bargaining is opened and the

Dean Garrison's proposal to relieve the Board of the duty to determine the appropriate bargaining unit in union rivalry cases would lead to another case where the duty to bargain collectively would be suspended. Another type of situation is suggested in *Aronsson Printing Co.*, 13 N.L.R.B. 799 (1939), where the employer's refusal to sign "standard" union contracts until the union should have secured such contracts with employer's principal competitors was held justified. In the majority of cases the factor of competition was not recognized as a reason for not bargaining collectively. *J. Chester & Sons Co.*, 13 N.L.R.B. 1 (1939); *American Range Lines*, 13 N.L.R.B. 139 (1939); *Geo. P. Pilling & Son Co.*, 16 N.L.R.B. 650 (1939); *Harbor Boat Building Co.*, 1 N.L.R.B. 349 (1936); *Harry Schwartz Yarn Co.*, 12 N.L.R.B. 1139 (1939). These cases fall under the general principle that the employer's financial condition does not absolve him from his duty to negotiate with the representatives of the employees. *Pittsburg Metallurgical Co. Inc.*, 20 N.L.R.B. No. 103 (1940); *Pioneer Pearl Button Co.*, 1 N.L.R.B. 837 (1936); *Atlas Bag & Burlap Co. Inc.*, 1 N.L.R.B. 292 (1936); *Lane Cotton Mills Co.*, 9 N.L.R.B. 952 (1938); *Holston Mfg. Co.*, 13 N.L.R.B. 783 (1939).

34. *Jeffery-De Witt Insulator Co.*, 1 N.L.R.B. 618 (1936).

35. *Ibid.*; *Trenton Garment Co.*, 4 N.L.R.B. 1186 (1938); *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939); *Seas Shipping Co.*, 4 N.L.R.B. 757 (1938); *John Minder & Son*, 6 N.L.R.B. 764 (1938); *Aluminum Products Co.*, 7 N.L.R.B. 1219 (1938); *Cullon v. Ghertner*, 14 N.L.R.B. 21 (1939); *Essex Wire Corp.*, 19 N.L.R.B. No. 12 (1940); *Reed & Prince Mfg. Co.*, 12 N.L.R.B. 944 (1939); *Republic Creosoting Co.*, 19 N.L.R.B. No. 30 (1940). *ROSENFARB, op. cit. supra* note 26 at 217.

36. *Sands Mfg. Co.*, 306 U. S. 332 (1939).

situation changes, a new cause for further negotiation is created.³⁷ The duty to bargain has not ceased permanently but only for the time being.³⁸ It was only temporarily inoperative. During this suspension in negotiations caused by a deadlock, the employer who is only temporarily relieved from the duty to bargain collectively may bargain individually with his employees.³⁹ His right to enter into individual bargains and employment contracts exists as long as the impasse lasts provided only that there is no intention to evade or obstruct collective bargaining.⁴⁰ And, as mentioned above, it is terminated by any change in the situation which causes collective bargaining to be resumed. The tendency of the NLRA is to restore the duty to bargain collectively as soon as possible. As soon as "new issues" are introduced,⁴¹ for instance the intervention of conciliators,⁴² then there revives the employer's duty to meet with the representatives of the employees in order to resume negotiations.⁴³ This duty to reenter into negotiations upon new contingencies remains alive as long as a collective agreement has not been reached. Such an agreement, if finally achieved, could then replace the individual bargains. In other words: Such individual bargains which are permitted for the time being are intended to be as shortlived as possible.

b. The second group of exceptional cases arises through such incidents as the lack of a majority union. As long as no majority has emerged, there can not be a duty on the part of the employer to deal

37. S. L. Allen & Co., 1 N.L.R.B. 714 (1936).

38. ROSENFARB, *op. cit. supra* note 26 at 218.

39. ROSENFARB, *op. cit. supra* note 26 at 230, refuses to grant the employer this right. He denies that the impasse constitutes an exception of the employer's duty to bargain with the representatives of an *existing* majority. But he must admit that the Supreme Court and the Board have repeatedly drawn this conclusion and recognized the employer's right to bargain individually when a definite impasse has been reached. See: *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939) (four individual bargains with four foremen upon a new and different basis were considered valid); *Legil-Fencil Co.*, 8 N.L.R.B. 988 (1938).

40. *Chicago Apparatus Co.*, 12 N.L.R.B. 1002 (1939); *Chesapeake Shoe Mfg. Co.*, 12 N.L.R.B. 832 (1939) (granting to individual employees terms which were refused to the Union's representatives during the negotiation); *Columbian Enameling & Stamping Co.*, 1 N.L.R.B. 181 (1936) (negotiating with individual employees in spite of the fact that representatives were designated); *Remington Rand Inc.*, 2 N.L.R.B. 626 (1937); *Timken Silent Automatic Co.*, 1 N.L.R.B. 335 (1936); *Jeffery-De Witt Insulator Co.*, 1 N.L.R.B. 618 (1936); *Inland Steel*, 9 N.L.R.B. 783 (1938); *Biles Coleman Lumber Co.*, 4 N.L.R.B. 679 (1937).

41. S. L. Allen & Co., 1 N.L.R.B. 714 (1936).

42. *Jeffery-De Witt Insulator Co.*, 1 N.L.R.B. 618 (1936).

43. In *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939), the Supreme Court has clearly defined and limited the duties of the employer to resume negotiations in case of an impasse.

with the representatives chosen by the majority. This was the ruling in *Mooreville Cotton Mills*,⁴⁴ and has been affirmed in many subsequent cases.⁴⁵ However, the employer's obligation to bargain collectively includes his duty to cooperate to a reasonable extent in an inquiry as to a union's claim to have been designated as the exclusive representative by the majority of employees. Refusal to cooperate in ascertaining the presuppositions of collective bargaining is equivalent to refusal to bargain collectively.⁴⁶

It is of no importance whatever circumstances cause the absence of any presuppositions for collective bargaining. The cause may be:

- (1) that all the employees or a majority of them simply refuse to join any union, or to select and designate bargaining representatives,⁴⁷
- (2) that the majority is not discernible by the means provided by statute,⁴⁸ or
- (3) that a previously existent majority was lost without unlawful interference by the employer, and no new majority has yet been formed.⁴⁹

Since in all these cases the employer is under no duty to bargain collectively, he is free to enter into individual contracts. But this state of

44. *Mooreville Cotton Mill*, 2 N.L.R.B. 952 (1937).

45. *Wallace Mfg. Co. Inc.*, 2 N.L.R.B. 1081 (1937); *Titan Metal Mfg. Co.*, 5 N.L.R.B. 577 (1938); *M. Lowenstein & Sons*, 6 N.L.R.B. 216 (1938); *Falk Corp.*, 6 N.L.R.B. 654 (1938); *Grace Corp.*, 7 N.L.R.B. 766 (1938); *Pure Oil Co.*, 8 N.L.R.B. 207 (1938); *Shellabarger Grain Products Co.*, 8 N.L.R.B. 336 (1938); *Altorfer Bros. Co.*, 5 N.L.R.B. 713 (1938); *Williams Mfg. Co.*, 6 N.L.R.B. 135 (1938); *Republic Creosoting Co.*, 19 N.L.R.B. No. 30 (1940); *Baumann Bros. Furniture Mfg. Co.*, 18 N.L.R.B. No. 91 (1939) (union represented majority, but not in all the appropriate bargaining units); *Fox-Coffey-Edge Millinery Co.*, 20 N.L.R.B. No. 66 (1940).

46. *Burnside Steel Founding Co.*, 7 N.L.R.B. 714 (1938); *Serrick Corp.*, 8 N.L.R.B. 621 (1938).

47. *Lauf v. Shinner & Co.*, 303 U. S. 323 (1938); *Swing v. A. F. of L.*, 298 Ill. App. 63, 18 N. E. (2d) 258 (1938); *Fur Workers Union (C.I.O.) v. Fur Workers Union (A. F. of L.) & H. Zerkin & Sons Inc.*, 105 F. (2d) 1 (App. D. C. 1939); *Southwestern Engineering Co.*, 14 N.L.R.B. 104 (1939).

48. *Peninsula & Occidental S.S. Co. v. NLRB*, 98 F. (2d) 411 (C. C. A. 5th, 1938) (either during the run-off election or when the Board refuses to designate the bargaining agency).

49. Not even the order of the Board to bargain collectively with a specific union bestows upon the union involved a perpetual tenure as bargaining representative. The duty to bargain collectively ceases when the union loses the majority of the employees. However, "the loss of majority must be due to forces outside of unfair labor practice of the employer". *ROSENFARB, op. cit. supra* note 26 at 204, 586; *Kiddie Kover Mfg. Co.*, 6 N.L.R.B. 355 (1938); *Bradford Dyeing Association*, 4 N.L.R.B. 604 (1937). Otherwise, the union which lost its majority through unfair labor practice of the employer is still empowered to represent the employees under the doctrine of "presumptive authority." *Reading Batteries*, 19 N.L.R.B. No. 29 (1940).

affairs does not satisfy the goal of the Wagner Act. It will exist only temporarily.⁵⁰ When a majority is formed or ascertained, then the duty to bargain collectively will become operative again⁵¹ and a collective agreement is expected to replace the individual bargains. Again the transitory character of these individual bargains is obvious.

The other problems regarding individual bargains can only be touched upon in this connection under later sections. Their full exposition would require a thorough discussion of the nature of the collective agreement.

The two cases mentioned above represent individual bargains to be concluded in the absence of and instead of a collective agreement. Is it possible to enter into individual bargains in addition to a collective agreement? Commons and Andrews assert that the individual employee ". . . virtually makes no individual bargain at all unless through individual bargaining he is able to secure better terms than those contained in the collective bargain."⁵²

Such a general solution is questionable in the absence of any established principle or positive statutory provision to this effect in American labor law.⁵³ The question still remains unsettled, whether employment conditions fixed through collective agreements could be generally altered by concurrent or subsequent individual contracts which secure better terms of employment. If the data be reversed the question would be whether the collectively bargained standards could be lowered by individual contracts. There seems to be very little doubt that the answer to this question is in the negative. For, collective agreements purport at least to secure minimum standards which can not be lowered by individual contracts.⁵⁴

Repeatedly it has been pointed out that individual bargains are only

50. This is obvious in cases (2) and (3). In case (1) the unions will put pressure upon employer and employee who refuse to create the prerequisite for collective bargaining. The courts have continuously refused to enjoin unions from aggressive but legal actions to bring about unionization. The lack of majority in this type of case is bound to be temporary only. See cases cited in note 29.

51. The duty was suspended in cases (2) and (3), latent in case (1).

52. COMMONS AND ANDREWS, *op. cit. supra* note 2 at 372. There is no established precedent to this effect as far as the author could discover.

53. There is no established precedent to this effect. A *dictum* in *Illinois Central R.R. Co. v. Moore*, 2 Labor Cases 845 (C. C. A. 5th, 1940), tends to open the possibility for concluding such bargains without any restrictions in regard to their contents. The Circuit Court said: "But ordinarily there is nothing to prevent a special agreement." Thereby even the possibility to conclude bargains containing less favorable conditions than those fixed by the collective agreement is left open. Notes 54 and 86 *infra*.

54. *McNeill v. Hacker*, 21 N. Y. S. (2d) 432 (City Ct. 1940). Note 86 *infra*.

of a temporary nature. In the regular course, they are to be followed by collective agreements. Hence, in these cases the question arises, how do such subsequent collective agreements affect the individual bargains previously entered into without violation of the law? Collective agreements are intended to fix employment conditions generally. Therefore, it seems to be consistent that these generally established conditions are to have a modifying effect upon the prior individual bargains. This is most probably true whenever better conditions are arrived at through a collective bargain. Do, however, less favorable conditions of a subsequent collective agreement displace better ones which were agreed upon in previous individual contracts? This question⁵⁵ has never been discussed up to now in so far as the writer is aware. As stated above, it can not be answered definitely in the limits of this article. However, a few suggestive considerations may be sketched. A collective agreement may be changed through a subsequent agreement with the union concerned even if this latter agreement contains less favorable conditions.⁵⁶ Moreover, an individual contract between employer and employee was held to be "superseded" by a contract between an association of employers and a union.⁵⁷ These two facts seem to indicate a trend toward the opinion that subsequent collective agreements replace previous bargains either collectively or individually entered into, even if they lower the previously bargained conditions. Such an opinion seems to be not only justifiable but indispensable; else, it would not be possible to adapt terms of employment to economic conditions which have turned out to become worse.

In conclusion it may be said that individual bargains, which in exceptional cases may be validly entered into for the time being, are expected to be replaced as soon as possible through collective agreements. The question remains whether such collective agreements supersede previous individual bargains and whether individual bargains may be concluded in addition to collective agreements and modifying their conditions. These questions can be solved only in connection with a full discussion of the theory of collective agreements.⁵⁸

55. This question is touched upon in *Illinois Central R.R. Co. v. Moore*, 2 Labor Cases 845 (C. C. A. 5th, 1940), but not discussed in a general way. Moreover, this problem must not be confused with the reverse question whether collectively bargained terms of employment could be lowered through individual bargains. See note 54 *supra*, and note 86 *infra*.

56. Hamilton, *Individual Rights in Labor Contracts* (1938) 3 Mo. L. Rev. 252, 268.

57. *Individual Damp Wash Laundry Co. v. Meyers*, 10 Ohio O. 517 (1938).

58. See note 86 *infra*.

2. The second main problem refers to individual bargains which are not only contrary to the policy of the Wagner Act, but violate its provisions. The attempt to fix employment conditions through individual bargains is one of the persistently used means to evade and obstruct the duty to bargain collectively. Numerous are the cases in which the courts as well as the Board branded these attempts as unfair labor practices.⁵⁹ Particularly individual employment contracts imposing upon the employee the obligation not to ask for collective bargaining and to refrain from strikes⁶⁰ were considered similar to yellow dog contracts.⁶¹ The most recent device of this kind is to be found in the "Balleisen formula".⁶² This formula provides for a pattern-contract which is to be executed between the employer and each workman individually and not as a collective agreement with representatives of the employees.

59. Sands Mfg. Co., 1 N.L.R.B. 546 (1936); Columbian Enameling & Stamping Co., 1 N.L.R.B. 181 (1936); Timken Silent Automatic Co., 1 N.L.R.B. 335 (1936); Jeffery-De Witt Insulator Co., 1 N.L.R.B. 618 (1936); Remington Rand Inc., 2 N.L.R.B. 626 (1937); Inland Steel, 9 N.L.R.B. 783 (1938); Biles-Coleman Lumber Co., 4 N.L.R.B. 679 (1937); Atlas Bag & Burlap Co., 1 N.L.R.B. 292 (1936); Reed & Prince Mfg. Co., 12 N.L.R.B. 79 (1939); Stolle Corp., 13 N.L.R.B. 370 (1939); Jahn & Ollier Engraving Co., 24 N.L.R.B. No. 94 (1940); The Jacob Bros. Co., 5 N.L.R.B. 620 (1938); National Meter Co., 11 N.L.R.B. 320 (1939); Carlisle Lumber Co., 2 N.L.R.B. 248 (1936); Panther-Panco Rubber Co., 11 N.L.R.B. 1261 (1939).

Individual bargains which involve unfair labor practice have been held to be void as against the public policy of the NLRA entirely or partly. *McKay v. Retail Automobile Salesmen's Union*, 89 P. (2d) 426, 429 (1939), rehearing denied 90 P. (2d) 113 (1939).

On the other hand only those parts of the individual bargains which were considered unlawful have been held subject to restraint (if not, then adoption of individual contracts by company union would make the total agreement unlawful), *Phillips Petroleum Co.*, 23 N.L.R.B. No. 74 (1940).

60. Not through individual contracts, but only through collective agreement can the right to strike be renounced for the period of this agreement. See *Douglas Aircraft Co. Inc.*, 18 N.L.R.B. No. 9 (1939).

"The limitation (upon the right to strike) may be unobjectionable when reached as a result of collective bargaining with the representatives of the employees in an appropriate unit; . . . But imposition of such a limitation upon the individual employee may constitute not only a form of coercion resulting from the inequality of bargaining position, but also an obstruction, at the outset, to the development of effective organization, concerted activity, and collective bargaining." *Arcade-Sunshine Co.*, 12 N.L.R.B. 259, 264 (1939). See also author's forthcoming article, *Social Peace and National Defense*, to appear in *THOUGHT*, March 1941.

61. These were branded as yellow-dog contracts in *Atlas Bag & Burlap Co. Inc.*, 1 N.L.R.B. 292 (1936); *Hopwood Retinning Co.*, 4 N.L.R.B. 922 (1938); *American Mfg. Co.*, 5 N.L.R.B. 443 (1938); *National Licorice Co.*, 7 N.L.R.B. 537 (1938).

62. "An officer of petitioner admitted that he had consulted with the Brooklyn Chamber of Commerce in forming the contracts. The contracts involved here follow the 'Balleisen formula', said to be devised by L. L. Balleisen, Industrial Secretary of the Chamber." *National Licorice Co. v. NLRB*, 309 U. S. 350, 354 (1940), note 1.

"The benefits of the contract were limited to those employees who signed. In return the signers relinquished the right to strike, the right to demand a closed shop or signed agreement with any union."⁶³

These two sentences mark the most significant contents of the Balleisen formula. This formula does not explicitly interdict employees from joining any union of their own choosing. It deprives them, however, of the right to demand a union contract. This actually amounts to a waiver of the right to bargain collectively.⁶⁴ Moreover, the Balleisen formula provides for arbitration as to rate of wages and the number of regular hours of employment per week, but explicitly states that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation." "The effect of this clause was to discourage, if not forbid any presentation of the discharged employee's grievances to appellant through a labor organization or chosen representatives, or in any way except personally."

There can be no doubt that the Balleisen contracts violate the NLRA in two respects: through restraint and coercion of the employee's right to self-organization as well as through refusal to bargain collectively. The difficulty in the *National Licorice Co. v. NLRB* case arose from a procedural angle. The Board ordered the employer to post notices to announce that the contracts with the employees were "void and of no effect." The employees were not parties to the suit. "It is elementary," the Supreme Court states "that it is not within the power of any tribunal to make a binding adjudication of the rights *in personam* of parties not brought before it by due process of law."⁶⁵ Moreover, the NLRA contemplates no more than the protection of the public rights which it creates. The Board's order which is directed solely to the employer is ineffective to determine any private rights of the employees "and leaves them free to assert such legal rights as they may have acquired under their contracts." For these reasons, the Supreme Court modified the Board's order so that it would more accurately represent the affirmative action of the Board and that misinterpretations of its action might be avoided. By this modified order the employer was compelled to announce:

"that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in vio-

63. *National Licorice Co. v. NLRB*, 309 U. S. 350, 355 (1940); *Jahn & Ollier Engraving Co.*, 24 N.L.R.B. No. 94 (1940).

64. The right to bargain collectively is based on public law. It cannot be stipulated away. *Kollefer Mfg. Corp.*, 22 N.L.R.B. No. 22 (1940).

65. *National Licorice Co. v. NLRB*, 309 U. S. 350, 362 (1940).

lation of the National Labor Relations Act, and that the respondent will no longer offer, solicit, enter into, continue, enforce or attempt to enforce such contract with the employees, but this without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts.”⁶⁶

It would be possible to argue that this amounts to preserving for employees their rights under the individual contracts, while the employer is precluded by the Board's order from taking any benefit of such individual contracts. Thus, individual bargains and contracts entered into through unfair labor practice of the employer would work only for the benefit of the employees concerned and would burden only the employer. They would represent lop-sided contracts. But the nature of these contracts remains still dubious because the Supreme Court has pointed out:

“It [the Board's order] does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudice their rights in the event of such adjudication. We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it.”⁶⁷

In this way, the question of the private rights which the employees can assert under their individual bargains is still left open, while the rights of the employer are destroyed. Whatever might be the fate of the individual bargain, fixing the employment conditions, the employee retains his employee status. He was hired and remains so. The contract of hiring is not affected by the defects involved in the individual bargain over employment conditions. These individually bargained terms are certainly ineffective in so far as they violate the NLRA. Whether the other parts of these terms remain valid or not is uncertain at least for the time being.

It is obvious that such an employee status is defective. Uncertainty reigns as to what are the employment conditions. Obvious violations of the NLRA constitute the defects which must be remedied through negotiations in compliance with the Act, *i.e.* through collective bargaining in good faith. The defective individual bargains entail in all probability a one-sided burden upon the employer. This in turn will certainly induce the employer to free himself from this lop-sided situation by every possible effort to reach a collective agreement. Thus, in all probability,

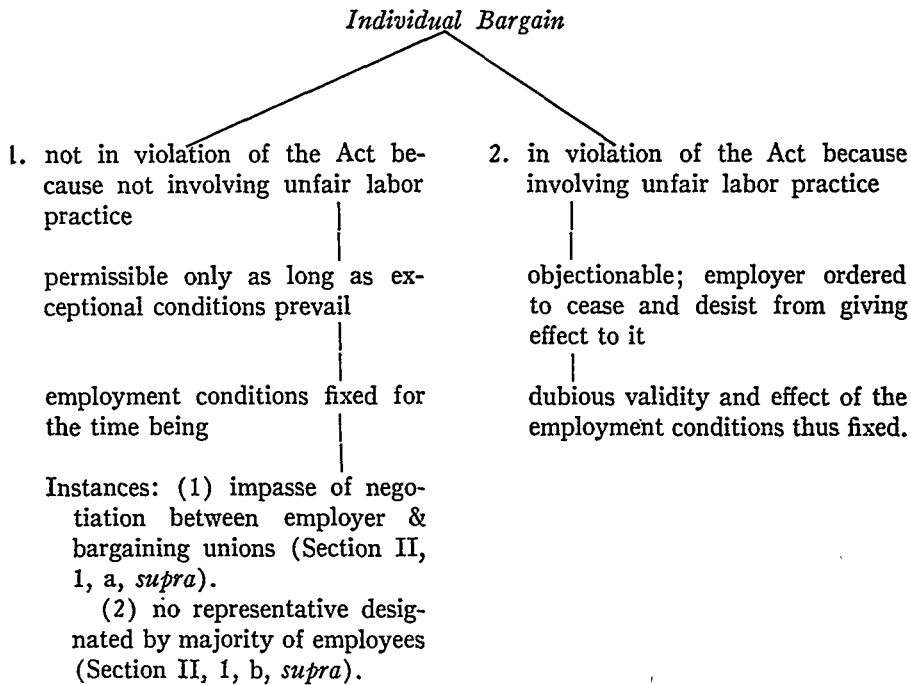
66. *Id.* at 367.

67. *Id.* at 365.

defective individual bargains will soon be replaced through collective agreements.

In conclusion it can be said that the individual bargains, whether permitted by the NLRA in exceptional cases or violating its provisions, are not intended to last, but to be replaced through collective agreements.

Our attempt to answer the first question raised above in Section I, A, namely, to outline the extent of individual bargains under the Wagner Act, can now be summarized in a graph:



III. *Individual Employment Contract and Employee Status*

It was pointed out above that the individual who enters into a relationship with an employer becomes integrated into the latter's business organization and dependent upon the employer's orders. He has acquired a peculiar set of rights and duties, granted and imposed by law. From a status which was free of these coexistent rights and duties he has changed to the status of an employee.⁶⁸

68. The term "employee status" is well understood and commonly used. *NLRB v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th, 1937); *Sunshine Hosiery Mills*, 1 N.L.R.B. 664 (1936); *C. G. Conn. Ltd.*, 10 N.L.R.B. 498 (1938); *NLRB v. Lightner Publishing Corp. of Illinois*, 113 F. (2d) 621 (C. C. A. 7th, 1940); *ROSENFARB*, *op. cit. supra* note 26 at 47.

In the "generic meaning" of the word, "an employee is a person who is hired."⁶⁹ In order to hire a person, an individual employment contract, the contract of hiring, must have been concluded. This was shown to be true in the case when the employer complies with the Wagner Act, when he bargains collectively and a collective agreement is reached. The result we called the regular and perfect employee status. But this was already shown to be equally true in the case when the employer bargains individually, either in accordance with the Wagner Act or in violation of its provisions. The first procedure was shown to lead to an imperfect, the second to a defective employee status. In all of those cases the employee, once hired, is *at work*; let us call his status *regular*.

The Wagner Act broadens the meaning of the term employee; for, this term in the sense of the Act embraces two cases in which individuals are actually not at work. They may either have ceased to work or have been prevented by unfair labor practice from being hired and from starting to work.

The NLRA provides that the term "employee" shall include "*any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.*"⁷⁰

This enlarged significance of the term "employee" refers, in the first place to those who once had been hired and actually at work, but ceased to continue working because of reasons mentioned above.

In the second place it is, however, possible that unfair labor practice may be committed against those who are not yet hired, but offer their services and are rejected because of their union activities. Such a rejection constitutes discrimination. Against discrimination the NLRB may take affirmative action and issue an order to the effect that such a rejected offeror of services shall be treated as a quasi-employee.

In both cases the individuals concerned are not at work. To distinguish this status from the regular case in which the individual has been hired and actually at work the status of employees out of work may be termed the *irregular* employee status.

In summing up, the following different phases of the employee status are to be distinguished:

1. *Regular Employee Status*: the employee is hired *and* at work.
 - a. The employment conditions and wages are determined by a collective agreement. This is the *perfect* phase of the regular employee

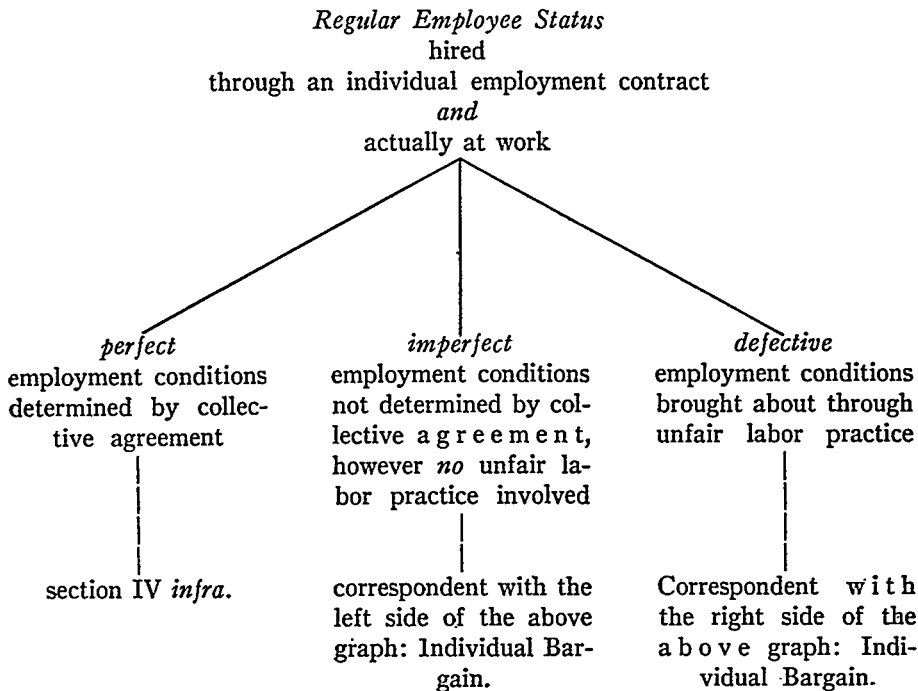
69. ROSENFARB, *op. cit.* *supra* note 26 at 49.

70. NLRA § 2 (3), 29 U. S. C. A. § 152 (3). (Italics inserted).

status under the NLRA. This phase of the status is perfect because nothing remains to be done in order to comply with the policy of the NLRA.

b. The employment conditions are not determined by collective agreement but no unfair labor practice is involved.⁷¹ This is an *imperfect* phase of the regular status. Employment conditions are fixed through individual bargains only for the time being. Perfection of this status through collective bargaining agreements is expected to be achieved as soon as the conditions for this extraordinary status cease to continue.

c. The employment conditions are fixed by individual contracts in violation of the Wagner Act.⁷² In such cases the status of the employee is regular, since he has been hired and is at work. This phase of the regular status is, however, defective because the ineffectiveness of the bargained conditions which violate the NLRA and the uncertainty as to the validity of the other conditions.



2. *Irregular Employee Status*: This term refers to individuals who are not working but are considered as being employees by operation of

71. Section II, 1 *supra*.

72. Section II, 2 *supra*.

law. Two main groups are to be distinguished. First, the individual concerned who is out of work has been hired by an individual employment contract. Since he is actually not working but his employee status is continued by operation of law, his employee status may be called constructive. Secondly, there are cases in which an individual who never has been hired by the employer in question is treated in the same way as if he had been hired. This case may be termed quasi-employee status.

a. Within the *constructive employee status*, where the employee has been hired but is actually out of work, the following distinction is to be made:

(1) The employee's work has ceased in connection with a labor dispute but not because of unfair labor practice. Let us consider the case of employees who went on strike during a deadlock in negotiations.⁷³ They retain the employee status and the right to vote in an election of representatives. Since, however, no violation of law is involved, there is no particular remedy in these cases. Therefore this situation may be termed: constructive but not remediable employee status.

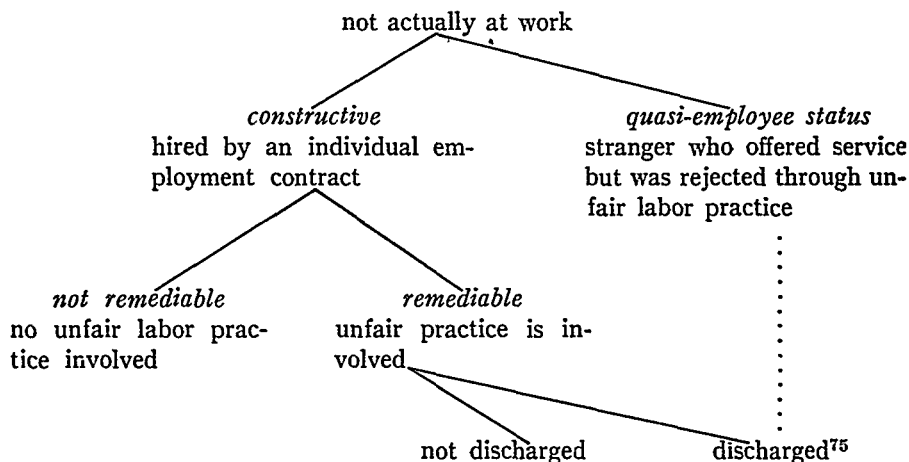
(2) In contrast to the above case, the employee's work has ceased because of unfair labor practice. Where unfair labor practice is involved the NLRA provides remedies for the termination of such irregularities. Therefore, this constructive status is termed remediable. In these cases, moreover, an important distinction is to be made, namely, whether or not the employment contract, once established through the act of hiring, is terminated by discharge. If the employee is validly discharged he is not only out of work but also out of his former contractual relation. If his former employee status is to be restored because of unfair labor practice, it may be questionable⁷⁴ whether he is for the time being in a constructive or in a quasi-employee status.

73. See impasse case Section II, 1 (a) *supra*.

74. The Supreme Court, in a *dictum* in *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939), has mentioned the possibility that the Board may issue an affirmative order to reemploy a discharged employee. Valid discharge in the case of remediable constructive employee status must be based on violent or unlawful conduct on the part of the employee who was discriminatorily discharged or went on strike in protest against unfair labor practice on the part of the employer. On the other hand, in cases of serious offense the Board has withheld orders for the reinstatement of the guilty individuals. If the reasons justifying valid discharge completely coincide with those for withholding the reinstatement orders of the Board the above stated subdivision would disappear. Then only one remediable constructive employee status would remain in the cases where the employees out of work are not guilty of any serious offense. Moreover, the main problem would be only to discover criteria for determining the seriousness of offenses which justify both the discharge and the denial of the remedial reinstatement order.

b. The *quasi-employee status* occurs, for instance, if someone who offers service to the employer is rejected only because of union activity. Discrimination with respect to hiring constitutes unfair labor practice, which in turn calls for remedy. This remedy consists in that the individual who has been rejected is treated as if he had been hired. Hence evolves the quasi-employee status.

Irregular Employee Status



IV. The Regular Employee Status

In the two cases of the imperfect and the defective regular employee status there is no collective agreement but an individual bargain in addition to an individual employment contract. The imperfect status where no unfair labor practice is involved is supposed to be merely temporary. In the case of the defective status the individual employment contract results from unfair labor practice; this status cannot last either. The implications of and the precedents referring to these two groups have already been discussed.⁷⁵

Therefore only the perfect regular employee status remains to be canvassed. In the case of this status the employment conditions of the in-

75. The dotted line shall express the possibility that the contractual relation of the employee in the constructive status, who was validly discharged, is terminated and that he, therefore, is in a similar position to a stranger in regard to reinstatement. In note 74 *supra* it should be noted, however, that discharge and reinstatement represent different spheres of the law. Discharge resorts to the private sphere of the law of master and servant; reinstatement is an instrument of the public law, as enacted in the NLRA.

76. See Section II, 1 and 2 *supra*.

dividually hired employees are governed by collective agreements. These employment conditions which are fixed through collective agreements enter into and become an ingredient of the individual employment contract. In other words, these employment conditions contained in collective agreements entail a regulatory or "normative" effect upon the individual employment contract. This normative effect of the collective agreement is the salient point. It characterizes collective labor law. Full explanation of this characteristic element is, however, not feasible within the bounds of this article because it would necessarily include the discussion of the whole theory of the collective agreement.⁷⁷ Therefore only a brief outline of this problem can be presented here.

The various provisions of collective agreements are of a twofold nature.⁷⁸ Partly, they have the effect of an ordinary agreement and constitute obligations between the parties to them, *i.e.* between the employer or the employers' association on the one side and the union representing the employees on the other side. One of the most important obligations to be found in the collective agreement is that of maintaining peace during the term of the agreement. A strike or lockout in violation of such an explicit or implied obligation contained in a collective agreement constitutes a breach of contract and renders such a labor dispute illegal.⁷⁹

Secondly, in contrast to other agreements the rights and duties which the collective agreement creates between the immediate parties to it, do not exhaust its legal effects. It also creates individual rights and duties of the individuals employed in the bargaining unit. The individual employee is entitled to claim, for instance, paid vacation as provided for in the collective agreement if he has complied with the requirements of such a provision. On the other hand, the individual employee is obliged to render service under the conditions and in the manner provided for in the collective agreement. Thus, for instance, he may be obliged to render service in cases of emergency outside the regular hours of work, *etc.*⁸⁰

The different theories which are applied to explain this effect upon in-

77. The theory of the collective agreement is to be discussed more fully in a subsequent article.

78. See Hoeniger, *op. cit. supra* note 16.

79. "There are many cases on record where unions were restrained from picketing or conducting a strike in violation of the terms of agreements prohibiting strikes and stoppages. There are . . . instances where employers have recovered damages by means of a representative suit against the officers of the union." LIEBERMAN, *THE COLLECTIVE LABOR AGREEMENT* (1939) 180. See also Section III of the author's forthcoming article, *Social Peace and National Defense*, to appear in *THOUGHT*, March 1941.

80. LIEBERMAN, *op. cit. supra* note 79 at 102.

dividual employees refer to custom and usage, to the rules of agency, to the idea of ratification through the individual employees, to the idea of an open offer of employment conditions, to be accepted by the individual employee or to the idea of third parties beneficiaries.⁸¹ It is, however, believed that these theories do not suffice to furnish a full explanation.⁸² Today in all cases governed by the Wagner Act or similar state statutes a more adequate theory may be drawn from these statutes. The normative effect is brought about through the majority rule and the exclusiveness of representation of all employees of the appropriate bargaining unit through the representatives chosen by the majority.⁸³ Such representation means that the collective agreements bargained by the exclusive representatives are binding upon those whom they represent exclusively. Even non-union members or individual employees belonging to the minority union are bound by the terms of the agreement executed by the exclusive representatives of the bargaining unit.⁸⁴ Only a few

81. For a survey of the theories see, JAEGER, *CASES AND STATUTES ON LABOR LAW* (1939) 759; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Hamilton, *Individual Rights Arising from Collective Labor Contracts* (1938) 3 MO. L. REV. 252; Witmer, *Collective Labor Agreements in the Courts* (1938) 48 YALE L. J. 195; and the citations in note 15 *supra*. *Illinois Central R.R. Co. v. Moore*, 2 Labor Cases 845 (C. C. A. 5th, 1940).

82. Hamilton, *op. cit. supra* note 81 at 253-259, has explained the insufficiency of these theories. In the conclusion of his article, at 273, he states: "The legal right of an individual to recover damages for violation of a collective labor contract which injures the employee is definitely established. No single principle that has been advanced to explain the origin of this right adequately accounts for all its consequences. Nor is this surprising, in view of the confusion which still shrouds the nature of the collective contracts from which these rights are derived."

83. NLRA § 9 (a), 29 U. S. C. A. 159 (a) reads as follows: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . ."

84. The workers who do the longshore work in the Pacific coast ports of the United States for the companies which are members of the employers' associations named in the decision constitute a unit appropriate for the purpose of collective bargaining, and the International Longshoremen's and Warehouse Union is the exclusive representative of all the workers in such unit. *Shipowners' Association of the Pacific Coast*, 7 N.L.R.B. 1002 (1938). Of the 12,860 longshoremen in the unit 9,557 have signed cards designating the International Longshoremen's and Warehouse Union as their representative. Nobody doubts that the collective agreement concluded between the employers' associations and the longshoremen's union has binding effect upon the employment relations of those 3,303 workers who did not sign cards for the Longshoremen's union. See note 88 *infra*, and *Yazoo & Miss. Valley Ry. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931); *Rentschler v. Missouri Pac. R. Co.*, 126 Neb. 493, 253 N. W. 694 (1934).

sentences from the Senate Committee Report suffice to show that it was the explicit intention of the legislature that the regulatory or normative effect of the collective agreement apply to the individual contracts of all the employees of the unit concerned. Thus the Report says:

"There cannot be two or more basic agreements applicable to the workers in a given unit. . . . Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action."⁸⁵

The significance of the "normative" effect of the provisions of the collective agreements consists in that they are by operation of law ingredients of the individual employment contracts of the employees of the unit in question.⁸⁶

Therefore we can conclude: In the case of the perfect regular employee status the employee is hired through an individual employment contract but his wages and his employment conditions are determined by the collective agreement bargained collectively for by the unit to which he belongs; it does not matter whether he is a member of the representing union or not. This effect is brought about through the "normative" nature of the collective agreement which derives from the statutory provisions referring to the majority rule and the exclusiveness of representation. The American way of bringing about this effect differs from the methods applied abroad.⁸⁷ Nowhere, however, can collective bargaining develop successfully unless the normative part of the collective agreement be made binding upon non-union members by whatsoever legal method. The main difference between the American way and the methods employed abroad can be sketched as follows. Abroad, wherever self-organization is well developed, collective bargaining precedes any

85. SEN. REP. NO. 573, 74th Cong., 1st Sess. (1935).

86. Many important questions derive from the theory of the normative effect of the collective agreement. There is some doubt if through an individual contract less favorable conditions than those contained in the collective agreement can be validly bargained. Hamilton, *op. cit. supra* note 81 at 258. There seems to be, however, an opinion that better conditions may be bargained individually. Notes 52-55 *supra*. If this be true, the collective agreement would fix only minimum conditions. Granting better conditions to certain individuals may sometimes result in discrimination against others. It is doubtlessly feasible to provide in the collective agreement that better conditions shall not be individually bargained. In this latter case the collective agreement would also fix maximum standard conditions.

87. Hamburger, *The Extension of Collective Agreements to Cover Entire Trade and Industries* (1939) 40 INTERNATIONAL LABOR REV. 153. Although this article covers a broader topic, it also presents a comprehensive survey of laws creating the binding effect of collective agreements upon individual contracts of employers or employees who are not members of the bargaining association or union. See further: METHODS OF COLLABORATION BETWEEN PUBLIC AUTHORITIES, WORKERS' ORGANIZATIONS AND EMPLOYERS' ASSOCIATIONS, INTERNATIONAL LABOR CONFERENCE (26th Sess. Geneva, 1940) *Collective Agreements with the Force of Law*, p. 112.

governmental activity for the purpose of making the collective agreement binding upon non-union members. After the collective agreement is concluded, the parties to it may petition the government to declare this agreement generally binding, *i.e.* binding upon non-members of the representing union. The government or its agency is empowered by statute to issue such an order, if the parties to the agreement cover the large majority of the employers and the employees concerned. In the United States, a government agency's order is not necessarily required to establish the binding effect of the collective agreement upon non-members of the representing union. The collective agreement is *per se* binding upon such non-union members under two presuppositions: (1) that the bargaining unit is appropriate, and (2) that the union or other bargaining agency represents the majority of the unit in question. There may be neither doubt nor dispute about the fact that these two conditions are met. In such a situation governmental interference is not necessary but is available. If, however, such doubt or dispute has arisen, the NLRB can be petitioned for certification of the appropriate unit and of the representation.⁸⁸ In contrast to the methods applied abroad in these cases the government agency steps in before the collective agreement is concluded. A certifying order of the Board removes any doubt regarding the fact that the non-members of the representing union are bound by the terms of the collective agreement.⁸⁹ In other words, in American collective labor law the "normative" effect upon contracts of non-union members can be brought about without governmental interference. However, when governmental interference becomes necessary, such interference precedes the collective bargain, while abroad the government agency steps in after the collective agreement has been entered into.

Having now adumbrated the genesis and effects of the regular and perfect employee status, we are able to turn to the question raised in section I, B of this article. There we pointed out that the individual employment contract necessary to produce this status in addition to

88. NLRA § 9 (b), (c), 29 U. S. C. A. § 159 (b), (c). The procedure in these cases as provided for in Section 9 is distinct from that in cases of unfair labor practice as regulated in Section 10 of the Act. A certification issued under Section 9 of the Act is not reviewable by the courts. See *A. F. of L., Longshoremen's Association v. NLRB*, 308 U. S. 401 (1939); *NLRB v. International Brotherhood of Electrical Workers*, 308 U. S. 413 (1939). The procedure for certification under Section 9 may be invoked in cases which are to be classified under the perfect regular employee status where the employer is willing to bargain collectively in good faith, but where there are doubts or disputes as to the appropriateness of the bargaining unit or to the representation.

89. *A. F. of L., Longshoremen's Association v. NLRB*, 308 U. S. 401 (1939); *Ship-owners' Association of the Pacific Coast*, 7 N.L.R.B. 1002 (1938).

the collective agreement denotes nothing more than the right to "hire and fire." Moreover, we said, even this right to "hire and fire" may be further restricted through collective agreements, *i.e.* through mutual consent, or by law, through the statutes preventing unfair labor practices.

First: The main instances⁹⁰ of such restrictions based on collective agreements may be mentioned. The closed shop proviso restricts the selection of prospective employees to union members.⁹¹ Often such clauses provide that the union furnish the employer with the required number of competent workers.⁹² If it is agreed that in lay-offs and re-hiring seniority⁹³ shall govern, there are restrictions, voluntarily entered into, qualifying the right to select and discharge employees. Furthermore, various clauses of collective agreements restrict or even exclude the right of the employer to discharge employees without good and sufficient reason.⁹⁴ In numerous provisions for the adjustment of grievances⁹⁵ machinery for mediation or arbitration is established in cases of dispute over the question of sufficient reason for discharge. A complete analysis of the clauses affecting the right to "hire and fire" would probably show that in actual practice this right is encumbered to a large extent through collective agreements. Therefore we may state: the individual employment contract of today, even in the most regular cases, where a collective agreement is voluntarily entered into and no governmental interference is involved, is often characterized by these encumbrances on the arbitrary power of the employer to select and to discharge his employees. These encumbrances are based upon a voluntary agreement. They result from cooperation between management and labor in

90. A complete analysis of the clauses purporting restrictions on the right to "hire and fire" would overstep the bounds of this article.

91. LIEBERMAN, *op. cit. supra* note 79 at 203; ROTWEIN, *LABOR LAW* (1939) 94.

92. An interesting consequence of this restriction is that unemployed union members who can accept employment in their regular occupation only if secured by the union, are exempted from compulsory registration for work when they are claimants of unemployment insurance benefits. See *Occupations of Applicants for Work* (1939) NEW YORK CITY ACTIVE FILE OF NEW YORK STATE EMPLOYMENT SERVICE iv.

93. *Seniority Provisions in Collective Agreements* (1938) 47 MONTHLY LABOR REV. 1250.

94. LIEBERMAN, *op. cit. supra* note 79 at 86. A comparative study of labor law would reveal that there is a tendency throughout the world to restrain the right of arbitrary discharge.

95. "It will be difficult, as a practical matter, for management to refuse to concede to employees the right of appeal of discharge complaints through a formal grievance procedure." BERGEN, *Management Prerogatives* (1940) 53 HARV. BUS. REV. 280. See also *Settlements of Grievances under Union Agreements* (1940) 50 MONTHLY LABOR REV. 286.

a particularly important field. Their tendency is to create an interest similar to a right to and tenure of the job.

Second: The NLRA itself imposes restrictions upon the employer's right to hire and to fire. These are embodied in Section 8 (3) of the Act which makes it an unfair labor practice "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." Violation of this provision has a peculiar effect. It affects the employee status. In the case of discriminatory discharge the regular employee status converts into the irregular status. The employee remains employee within the scope of Section 2 (3) of the NLRA. Thus the constructive and remediable employee status is created. When the employer is shown to have discriminated against persons offering their services, the policy of the NLRA is to protect those persons by granting them a quasi-employee status. So unfair labor practice itself creates new forms of employer-employee relations. These types of the irregular employee status will be discussed in detail.

[To be continued]